OCT 1 1941
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Supreme Court of the United States

OCTOBER TERM, 1941

No. 540

IN THE MATTER

OF

SARAH M. NICHOLS,

Bankrupt.

TRUSTEE-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Patrick J. Tuffy, the Trustee of the bankrupt estate of Sarah M. Nichols (now deceased) (fols. 42-43), opposes the petition of the deceased bankrupt's three sons to have this Court review a Referee's order (fol. 88) directing The Branford Trust Company of Branford, Connecticut, individually, and as administrator of the estate of Sarah M. Nichols, deceased, to turn over to the Trustee certain monies or funds in its possession. The order contained no provision or direction relating to the petitioners (fol. 88). The petitioners are not aggrieved parties. The Referee's order was confirmed by the District Judge of Connecticut (fols. 130-131) and affirmed unanimously by the Second Circuit Court of Appeals (120 F. [2d] 906).

Errors in the Printed Record

At folio 66 of the printed record below, the year "1939", appearing twice, should read "1940" in both instances.

Facts

For brevity and clarity, we state the facts as concisely as possible. This is simpler and more satisfactory than supplying the matter omitted from the petitioners' statement. Besides, it will dispel many of the factual fancies and inconsistent contentions of the petitioners without according particular treatment to each of them.

Sarah M. Nichols (nee *Sarah Updike Mabbatt,* 127 Conn. 1, 14 A. [2d] 626), while residing and engaged in business at No. 105 East 15th Street in New York City (fols. 163, 172), filed a voluntary petition in bankruptcy in the Southern District of New York, on December 18, 1912, and was duly adjudicated the same day (fols. 26-27, 163, Exs. C, E). Her filed schedules, in the form prescribed by this Court, listed liabilities of $6,039.10, a small amount in assets which proved to be utterly worthless (fols. 163-167, Ex. C, Sched. A), and set forth in Schedule B(4) "None" opposite "Property in Reversion, Remainder or Expectancy, and Rights and Powers, Legacies and Bequests" (fols. 167-171, Ex. C, Sched. B). Thus, Mrs. Nichols failed to schedule her vested interest in the remainder of the estate of Eli F. Rogers, deceased, the proceeds of which are the immediate concern of this summary proceeding, and her vested interest in the income from a trust fund as well as a $10,000 vested interest in the remainder under the will of Henry B. Norton, deceased (fols. 167-171, Ex. C, Sched. B; fols. 172-173, Ex. E; 127 Conn. 1, 14 A. [2d] 626).

This omission was deliberate. The probate records in Connecticut only recently disclosed that Mrs. Nichols received annually in semi-annual payments between $700 and $900 from the income of the trust fund from 1891 to May, 1912, having received nearly $400 therefrom less than two months prior to filing her petition and nearly $400 additionally within five months after such filing.

In her examination at the first meeting of creditors Mrs. Nichols continued the concealment of these assets (fols.

172-173, Ex. E). Nowhere in the proceedings did there appear any reference to or indication of her Connecticut connections (fols. 172-173, Ex. E). After her examination was closed, Mrs. Nichols returned to Connecticut, taking up residence in Branford. This fact also was concealed from the Bankruptcy Court and creditors. She died there on May 29, 1913, without having applied for a discharge, leaving her three sons, the petitioners here, surviving (fols. 30-31, 192-193, 230, 232, Exs. N, X). This fact also was concealed from the Bankruptcy Court and creditors until November, 1939, when the Probate Court in Branford made an order requiring that notice of a hearing on the account of the administrator of Sarah M. Nichols, deceased, be mailed to the Referee and Clerk of the Bankruptcy Court and "to all scheduled creditors and all creditors who filed claims in the bankruptcy proceedings" (fols. 194-203, Ex. X).

No assets having been discovered, no trustee having been appointed and no application therefor having been made, the Referee filed his certificate to that effect on December 8, 1913, under the then Rule 9 of said Court and "closed" the case to enable the Clerk of the Court to disburse the fees deposited with him at the commencement of the proceedings (fol. 30).

In November, 1939, the Bankruptcy Court and creditors received the notice of the hearing on the administrator's account in the Nichols estate, and, upon investigating, discovered, for the first time, the interest in the Rogers estate, that it had been reduced to cash and was in the possession of The Branford Trust Company as administrator of Mrs. Nichols' estate (fols. 19-20, 40).

On January 24, 1940, on application promptly and properly made by one of the creditors, an order was duly made reopening the administration of the estate (fols. 35, 205-206, Ex. F). Thereafter, Patrick J. Tuffy was elected and qualified as Trustee (fols. 16, 42-43) and brought these summary turnover proceedings against The Branford Trust Company, individually, and as administrator of

Sarah M. Nichols (fols. 11, 46), and included the three sons of Mrs. Nichols, the petitioners here, as incidental parties (fols. 10-11, 45-46).

The Circuit Court mistakenly states that the petitioners here "answered the petition on the Trust Company's failure to do so and contested it below" (120 F. [2d] 906, 908 [1]). The Trust Company did answer the petition (fol. 4, par. 5) and contested on the hearing (fols. 110-111, [4] and [7]) and the motion and the turnover order entered thereon was directed solely against it (fols. 12, 46, 88, 108). The petitioners have no right to a review.

The petitioners here also answered below with various admissions, denials and new matter but nothing was set up or claim made for any affirmative relief in their favor (fols. 49-58). Neither did their answer assert any alleged two-year ban against the Trustee under Section 11(d) of the Bankruptcy Act, or of a bar of "laches" against the creditors.

On December 14, 1877, Eli F. Rogers, at Branford, Connecticut, made his will, by the Fifth paragraph of which he gave one-half of the "rest, residue and remainder" of his estate "to my niece Emily N. Mabbatt, or her issue" "per stirpes" (fol. 212). This was subject to a life use by Sophia M. Rogers, his wife (fol. 209).

Emily N. Mabbatt (Hatch) (fol. 23, par. 9) died intestate on August 3, 1895, leaving her surviving her issue, Sarah M. Nichols and four others (fols. 24, 186, 188, 223-224, 230, 232, Exs. J, O). There was no administration of her estate (fol. 24, par. 11).

In February, 1899, Eli F. Rogers died, survived by his widow, Sophia M. Rogers, and the issue of Emily N. Mabbatt (Hatch), which included Sarah M. Nichols (fols. 24-25, par. 12, fols. 223-224).

On March 13, 1899, the will was admitted to probate and recorded (fol. 221). Notice of the application to probate the will was duly given to Sarah M. Nichols as well as to her sisters and half-brother (fols. 223-226). Norton Hatch, one of the issue, died intestate (fols. 23, 26). Thereafter

Sarah M. Nichols died intestate on May 29, 1913, survived by three sons, the petitioners here (fols. 30-31, 192-193, 230, 232, Exs. N, X). There was no administrator of her estate appointed until 1917 (fols. 35, 235, Ex. T).

On April 27, 1915, Sophia M. Rogers, the life user, died intestate, survived by the three sons of Mrs. Nichols, among others (fol. 31, par. 23; fol. 63).

The Branford Trust Company then was appointed administrator d. b. n. c. t. a. (fol. 31) and subsequently filed its account showing Sarah M. Nichols as having a vested one-tenth interest in the rest, residue and remainder of the Rogers estate, which amounted to $2,613.17 (fols. 32, 175-177, 184, Exs. M, O). On July 18, 1916, the Probate Court ordered that notice of the hearing on the account and on the application for an order ascertaining the distributees and ordering distribution be given by publishing the order three times in a newspaper in the district and by posting it in Branford and, further, that a copy of the order be mailed to William E. Hatch (the half-brother of Frank Norton Hatch [then deceased], and stepson of Mrs. Emily Norton [Mabbatt] Hatch), Walter R. Nichols, Samuel R. Nichols (who is Russell Mabbatt Nichols), John W. Nichols (who is John Remington Nichols), the petitioners herein, and to the three living sisters of Sarah M. Nichols, deceased, who are daughters of said Emily Norton (Mabbatt) Hatch, deceased (Ex. N, fols. 229-230). Proof of the giving of such notice to the persons specified, as required by the order, was duly filed (Ex. N, fols. 231-233). The Branford Probate Court, by order dated August 24, 1916, determined that under the fifth clause of the Rogers will "Sarah M. Nichols formerly of Branford, Conn.," was entitled to one-tenth of the estate to be distributed, as was also "Frank Norton Hatch late of New Bedford, Mass.," who had predeceased Sarah M. Nichols as well as Sophia M. Rogers (fols. 184-186). By the same order the Court appointed the distributors to distribute in accordance with said order.

The return of the distributors, received and accepted by the Probate Court on December 29, 1917, stated that in accordance with the order "We have set out to Estate of Sarah M. Nichols $2453.32" and also "We have set out to the Estate of Frank N. Hatch $2,453.32" (fols. 187-189).

On April 3, 1917, Walter Rogers Nichols, one of the petitioners here, petitioned the Branford Probate Court to issue letters of administration on the estate of Sarah M. Nichols, deceased, to The Branford Trust Company (fols. 30-37, 235-238, Ex. T). To that petition was annexed the written consent of John Remington Nichols and Russell Mabbatt Nichols, the other petitioners here (fols. 35, 235, Ex. T). Letters were issued accordingly on June 14, 1917 (fols. 35-37, 235-236, Ex. T). The inventory and appraisal filed by the Trust Company as administrator of Sarah M. Nichols on November 16, 1939, set forth that the only asset of the estate at the time of her death was "Interest in Estate of Eli Rogers (one-tenth of estate subject to life use of Sophia M. Rogers, aged 80) $2,230.50" (fol. 37).

The three sons of Mrs. Nichols, the petitioners here, continued the scheme to conceal these assets from the Bankruptcy Court and her creditors. They did nothing to cause the estate to be distributed between 1917 and 1939. In 1937, the trust under the Norton will (from which Mrs. Nichols received a portion of the income from 1891 to the time of her death) terminated and the three sons claimed, in the proceedings in the Probate Court at Norwich to determine the distributees, that they were entitled to receive the $10,000 legacy directly under the will. The Probate Court in 1938 so ordered and then they decided to take their chances with the funds derived from the Rogers estate (*Congregational Home Mis. Soc.* v. *Thames Bank & Trust Co.*, 127 Conn. 1, 14 A. [2d] 626). The Trust Company, for its own protection, obtained the order requiring notice to the creditors in the Bankruptcy Court (fols. 39-40, 190-203, Ex. X). In this way the asset was discovered and these proceedings ensued (fols. 39-40).

However, the Trustee in the *Norton* will case appealed and the Superior Court reversed the Probate Court, held that the gift over to issue in that case was void as against the statute against perpetuities in effect when Norton died (but which was repealed in 1895), and that the gift over lapsed, and became part of the rest and residue to be distributed under other clauses of the will.

The petitioners here thereupon appealed to the Supreme Court of Errors of Connecticut, which Court reversed the Superior Court and held that the gift over was void, but that the $10,000 legacy vested in Sarah M. Nichols on the death of the testator in 1891 and should be distributed to her estate (*Congregational Home Mis. Soc.* v. *Thames Bank & Trust Co.*, 127 Conn. 1, 14 A. [2d] 626). Even this was not disclosed except indirectly and indefinitely by citation of the reported decision by their counsel about September 29, 1940, and later by their counsel, who advised that some $11,000 had been paid under the Norton will to the Trust Company as administrator of the Sarah M. Nichols estate. This was in deliberate defiance of the orders of the Bankruptcy Court served in January and May, 1940, on the Trust Company and the petitioners here. A proceeding is pending to compel a turnover of these assets as well.

The Questions Presented:

The real questions presented are:

(1) Can a bankrupt legitimately succeed in the concealment of assets from the Bankruptcy Court?

(2) Can the bankrupt's heirs bar the Bankruptcy Court from jurisdiction over personal property or funds, assets of the bankrupt properly applicable to her scheduled and filed debts, by delayed and concealed manipulation of the assets through the local state courts in a state and district foreign to the Bankruptcy Court of original jurisdiction?

ANSWERING PETITIONERS' POINT I

The decision of the Circuit Court of Appeals in this case does not conflict in any way with the decisions in any other Circuit.

(a)

The Trustee in our case proceeded to recover the unscheduled asset within a month or two after his election and appointment. This time was required to collect complete information and competent evidence to support the turnover application. The Referee, the District Judge and the Circuit Court have held that this was not an unreasonable time (120 F. [2d] 906, 909; fol. 88).

The requirement "to proceed within a reasonable time to recover unscheduled assets" would apply only to a Trustee and not to creditors who are listed or have filed claims in the proceeding, since the title to the asset resides in the Trustee and he must make the decision to accept or abandon or recover the property. The Referee, District Judge and Circuit Court have held that neither the Trustee nor the creditors are chargeable with constructive notice in our case on the facts, that the creditors had no actual notice until about November 20, 1939, and that their reopening the case within two months thereafter was not an "unreasonable time" even if the "rule" claimed by the petitioners applied to the creditors (120 F. [2d] 906, 909; fols. 84-88).

The decision in our case in no way conflicts with that in *Mills Novelty Co.* v. *Monarch Tool & Mfg. Co.*, 49 F. [2d] 28. In that case an innocent purchaser for value brought an infringement suit on a patent and the defendant's defense alleged it had no title, that the title belonged to the Trustee in bankruptcy of the original applicant. The bankrupt did not list in his schedules that the application was pending. The patent issued a year and a half

later. The Circuit Court assumed that the Trustee had filed his account and been discharged within a reasonable time after his appointment. The Trustee and the creditors made no effort at any time to acquire or retain the patent. The infringement suit was commenced thirteen years later. The Circuit Court held that a "patent application" was not a "patent right" or "property", was not required to be scheduled and did not pass to the Trustee when elected; that a "patent application" was in effect a lawsuit which the Trustee could assume or abandon; that the filing of a patent application was not constructive notice, but that when the patent issued it constituted constructive notice throughout the United States; that the Trustee abandoned the application and the patent when issued by filing his account and securing his discharge after the patent issued.

The issuance of a patent is National notice since the Patent Law, Section 39 of 35 U. S. C. A., requires filing in the Federal Patent Office, and Section 40 of 35 U. S. C. A. protects the holder in all of the United States and its Territories.

In our case the Circuit Court has held that local state statutes and orders of local state courts, particularly inferior courts, can have no extra-territorial effect and did not, in this instance at least, constitute constructive notice of any kind to the Bankruptcy Court in New York (120 F. [2d] 906, 908, 909; fols. 86-87).

The distinction between this case and the *Mills Novelty Co.* case is amply shown in the Referee's opinion and by the District Judge and considered by the Circuit Court (120 F. [2d] 906, 909). For brevity, we here adopt the treatment of this case by the Circuit Court (supra) and folios 82-86 and 127-130 of the printed record.

The Trustee here was appointed in 1940 (fols. 42-43) and hence could not be charged with constructive knowledge as of 1916. In the *Mills* case the Trustee was not a party and was not held barred of his right thereto. The Circuit Court there held merely that the attack on plaintiff's title to the patent was not sustained.

Incidentally, the only "burden" on the funds derived from the Rogers estate as well as on the funds derived from the Norton estate and belonging to the bankrupt estate herein has been and is being occasioned by the petitioners in pursuing their scheme to defraud the Bankruptcy Court.

In *Packer* v. *Meeks*, 96 Conn. 319, it was held that an heir, resident in Connecticut, had legal notice of the application to probate her brother's will in Connecticut where the notice was published under the Connecticut statute and a copy mailed to her at the address given by her to the Probate Court for that purpose in order to start the running of her time to appeal from the decree admitting the will to probate. It has no application to this case in any aspect.

(b)

The decision in this case does not conflict with the decision in *In re Martin*, 47 F. (2d) 498. In that case the Trustee in bankruptcy sought to recover an undivided share of an estate resulting from an interest which the bankrupt had not listed in his schedules. It was claimed by the Trustee that at the time of adjudication the bankrupt had a vested interest in part of the property in trust under the will of William H. Wood probated in Tennessee. The Circuit Court held that under the Tennessee statutes and authoritative decisions interpreting and announcing the law in Tennessee, the interest was not vested but one of a contingency subsequent which had not occurred at but did occur subsequent to the date of adjudication and hence was not part of the bankrupt's estate and title thereto did not pass to the Trustee. The case is quite different from this case and the two cases are not in conflict.

At the time of the probate of the Norton will (1891) and of the Rogers will (1899), Mrs. Nichols resided in New Haven, Connecticut, in the same county as Branford. She was mentioned specifically in the Norton

will, being given an interest in the income from a trust fund, from which she actually received between $700 and $900 annually, the next to last semi-annual payment being received by her about a month before she filed the bankruptcy petition, and the last several months later and just before her death, and also a $10,000 legacy payable out of the remainder upon the termination of the trust (127 Conn. 1, 14 A. [2d] 626). She was specifically mentioned for service of notice of the probate proceedings in the Rogers estate (fols. 223-226, Ex. J) and, being a resident of Connecticut, under *Packer* v. *Meeks*, 96 Conn. 319, cited by petitioners, she received legal notice thereof.

The burden was on the bankrupt or her legal representatives in this proceeding to rebut the inference that she knowingly and fraudulently concealed this asset in her schedules and testimony. The rule, stated in *In re Wood*, 98 Fed. 972, has been accepted so universally that it does not appear to have been raised in this Court. The evidence in the Norton instance irrefutably proves her knowledge and the failure to schedule it or disclose it in her testimony establishes the fraud. The proof in this, the Rogers instance, is ample and not refuted. The facts also establish the continuance of the fraud by the petitioners here.

ANSWERING PETITIONERS' POINT II

The Circuit Court's decision conforms with those of the Connecticut Courts on the Connecticut law.

Keogh, Referee, is a Connecticut lawyer and jurist of long standing. Hincks, D. J., is a Connecticut lawyer and jurist whose expressed deliberations are unusually well considered. Clark, Cir. J., the author of the unanimous opinion here criticised by the petitioners, was formerly Dean of the Yale Law School and is a co-author of the authoritative work on Probate Law and Practice in Con-

necticut (Cleaveland, Hewitt & Clark). While each or all of these can err, the Supreme Court of Errors in Connecticut, the State's highest court, has decided the precise question in the Norton will case, referred to above, in May, 1940 (*Congregational Home Mis. Soc.* v. *Thames Bank & Trust Co.*, 127 Conn. 1, 14 A. [2d] 626).

(a)

The failure to apply for a discharge does not destroy the Bankruptcy Court's jurisdiction over the bankrupt's property and its distribution to creditors. It merely leaves open to the creditors the additional right to proceed against the bankrupt's property acquired subsequent to the petition in bankruptcy. It does not relegate the creditor to that remedy only. The creditor still may pursue his remedies in the Bankruptcy Court. Death does not abate the bankruptcy proceedings and her administrator could have applied for a discharge (Sec. 8, c. 541, 30 Stat. 549, 11 U. S. C. A., Sec. 32; *In re Agnew*, 225 Fed. 650; *Shute* v. *Patterson, et al.*, 147 Fed. 509; *In re Spalding*, 139 Fed. 244; *In re Kehler*, 159 Fed. 55).

The acts of the petitioners here in having an administrator appointed and in having the funds from the Rogers legacy paid over to and retained by the administrator, and the acts of the administrator in receiving and retaining said moneys and, further, in receiving and retaining the additional funds from the Norton legacy during the appeal herein, are in direct violation of the provisions of the Bankruptcy Act and the orders of the Bankruptcy Court. If the creditors now pursued their additional remedy by suing the administrator in the Connecticut courts, they might be subject to the statutory bars cited by the petitioners. But in this case the Trustee of the deceased bankrupt seeks to have the administrator of the deceased bankrupt turn over property or funds properly belonging to him as such Trustee and belonging exclusively in the jurisdiction of the Bankruptcy Court.

The Court below did not decide as is asserted in the petitioners' brief under this point. It did decide that, where the Bankruptcy Court obtained jurisdiction, state courts or statutes could not oust it of that jurisdiction nor hamper, hinder or bar its proper proceedings; that the legal representative of a decedent bankrupt may not retain in its possession property existing at the time of the bankruptcy but reduced to possession subsequent thereto and to which the Trustee took title upon qualifying.

(b)

The petitioners argue here that this Court should determine that the Probate Court of Branford, Connecticut, erred in making its order of distribution in the Eli F. Rogers estate on August 24, 1916, which determined that Sarah M. Nichols had a vested interest upon the death of Eli F. Rogers and the admission of his will to probate in 1899. It further argues that this Court now may pass over that determination and direct such a distribution by denying the Bankruptcy Court jurisdiction over the property.

The Circuit Court has held in this case that the bankrupt had a vested interest in the Rogers estate at the time she filed her schedules. The Circuit Court also holds that the Branford Probate Court in the Rogers estate determined she had such a vested interest and that it is binding on these petitioners (120 F. [2d] 906, 910 [12, 13]). The same Probate Court made a similar determination on the petition of these petitioners in issuing letters of administration on the estate and in accepting and approving the appraisers' report in the Sarah M. Nichols estate (fols. 35-38). This determination also is binding on the petitioners here.

The Supreme Court of Errors of Connecticut, in a matter to which these petitioners were parties and appellants, has determined a parallel case involving the Norton will (127 Conn. 1, 14 A. [2d] 626, cited by the Circuit Court, 120 F. [2d] 906, 910 [11]).

The overwhelming weight of authority in Connecticut and elsewhere compels this conclusion on the facts in this case (120 F. [2d] 906, 909, 910; fols. 112-127, Hincks, D. J.; fols. 73-80, Keogh, Ref.; *McArthur* v. *Scott*, 113 U. S. 341, 378, 379; *Doe* v. *Considine*, 6 Wall. 458, 476; *Moore* v. *Lyons*, 25 Wend. 119, 144; *Blanchard* v. *Blanchard*, 1 Allen 223, 227; *In re Haslett*, 116 Fed. 680; *In re St. John*, 105 Fed. 234; *In re McHarry*, 111 Fed. 498; *In re Dorgan*, 237 Fed. 507; *Pollack* v. *Meyer Bros. Drug Co.*, 233 Fed. 861; *Loomer* v. *Loomer*, 76 Conn. 522, 57 Atl. 167; *Gaffney, as Trustee in Bankruptcy*, v. *Shepard*, 108 Conn. 339, 143 Atl. 236.

The Probate Court had jurisdiction over the Rogers estate. It decreed that Sarah M. Nichols was vested, as of the testator's death, with a one-tenth interest in the "rest, residue and remainder" to be paid over to her upon the death of the life user (fols. 184-189, Ex. O); that, having died before distribution, the money should be paid to her estate. The creditors of Mrs. Nichols, at the time of her adjudication, had no claim against the Rogers estate—only against her estate which she herself had brought into the jurisdiction of the Bankruptcy Court. This jurisdiction was exclusive and any attempt by the Probate Court to acquire jurisdiction over the property or funds was in violation of the Bankruptcy Act and the orders of the Bankruptcy Court. The administrator appointed on petition of the petitioners here was an usurper and could not legally acquire title or the right to possession. When the Trustee was appointed, he took title as of the date of adjudication. Local law could have application only to determine whether or not and when her interest vested. And that being determined as of the date of the testator, the property was brought within the exclusive jurisdiction of the Bankruptcy Court.

The Circuit Court so held (120 F. [2d] 910) and the cases cited there support the conclusion squarely. (See also the Referee's decision, fols. 80-87, and cases cited.)

ANSWERING PETITIONERS' POINT III

The case does not present unsettled important questions of Federal law.

This point does not call for the construction or applicability of the Bankruptcy Act. It asserts that the Act does not contain provisions covering various imaginary contingencies. Such argument must be addressed to Congress and not to this Court.

The "two-year limitation" now referred to was not an issue below. It is not mentioned in the petitioners' answer to the Trustee's petition below (fols. 49-59).

The Act requires the proceedings for a discharge to be prosecuted within a specified time, otherwise no discharge is granted. The bankrupt then—common sense dictates—still is liable in full for his debts—for the difference between the amount received through the Bankruptcy Court and the total amount of the debt.

The Act provides the estate may be reopened for cause to administer newly discovered assets and for that purpose a Trustee may be elected, even though it is a "long period of years". The "barring" of creditors remedies in the state courts does not affect their status in the Bankruptcy Court unless the time had run prior to the filing of the petition in bankruptcy.

The Act requires creditors to file claims within a specified time or be barred and the Court takes over the bankrupt's property for distribution. There is no duty imposed upon a creditor to abandon his rights under the Bankruptcy Act and resort only to the state court remedies simply because the case is a "no-asset no-trustee case".

For brevity, we adopt the Circuit Court's (120 F. [2d] 908, 909) and the Referee's treatment of this point (fols. 67-70) which the District Court sustained (fol. 112).

There are two phases to this point, namely, (a) with respect to the application to reopen the administration of the

estate in order to bring these proceedings; and (b) with respect to these proceedings themselves.

The Circuit Court treats this at 120 F. (2d), pp. 908, 909.

The Referee has clearly shown that the application to reopen is not a "suit" within the limitation clause of the Bankruptcy Act as it existed at the time of the bankruptcy as well as under the present state of the statute (fols. 67-70). This is supported by the decision in *In re Paine*, 127 Fed. 246, 11 A. B. R. 351.

The petitioners are indefinite as to how this "question" arises.

Remark that the time of limitation in the statute runs from the date "the estate has been closed" (Sec. 11[d], Bkcy. Act of 1898). If the estate has been "reopened" in accordance with the statute, then it is no longer "closed" and the limitation cannot commence to run until it is "closed" again.

In the case of *In re Schreiber*, 23 F. (2d) 428, cert. denied 277 U. S. 593, it was held that the statutory limitation did not apply either to an application to reopen the administration of the estate or to a proceeding against the bankrupt to recover undisclosed assets.

In our case the bankrupt is deceased and the proceeding was brought against her administrator, her legal representative, and, therefore, it is not brought against "third parties", as petitioners contended below.

Remark, that the petitioners are in the position of mere donees and are not innocent purchasers for value of the assets sought (fol. 85).

In *Kinder* v. *Scharff*, 231 U. S. 517, it was held merely that where an asset was duly disclosed and the Trustee had knowledge of it but that he did not regard it as of any value and asserted no claim or title to it and closed the estate, he could not, more than two years later, when it proved to be of some value, bring an action against third parties, innocent purchasers for value, to set aside the conveyance of the asset to them. The holding in that case has no application here.

These proceedings are properly summary and hence do not fall within the term "suit".

In re Schreiber, 23 F. (2d) 428, cert. denied 277 U. S. 593.

ANSWERING PETITIONERS' POINT IV

The Circuit Court's decision is in accord with the applicable decisions of this Court.

The case of *Martin* v. *Commercial Nat'l Bank*, 245 U. S. 513, involved the validity of a chattel mortgage executed six months prior to but filed only the day before, and hence within four months of, the filing of the petition in bankruptcy. There are no implications that may be drawn from that decision which conflict in the least with the decision here.

It has been pointed out above that the decision of the Circuit Court is not in conflict with this Court's decision in *Kinder* v. *Scharff*, 231 U. S. 517.

Nor does it conflict with *Murphy* v. *John Hofman Co.*, 211 U. S. 562, or *Isaacs* v. *Hobbs Tile & Lumber Co.*, 282 U. S. 734. Both decisions squarely support the Circuit Court's decision in this case, the latter being cited as an authority for the decision (120 F. [2d] 906, 909 [5]). The Circuit Court here held that the Probate Court had jurisdiction to determine the distributees of the Rogers estate. But having determined that a portion was vested in the estate of Sarah M. Nichols it had no power or jurisdiction to administer or affect the Nichols estate which had been given over to the exclusive jurisdiction of the Bankruptcy Court (120 F. [2d] 906, 909 [5], 910 [12, 13]). In addition to the cases cited by the Circuit Court, see also *Lazarus* v. *Prentice*, 234 U. S. 263.

There is no perceivable conflict between the decision in this case and that in *Sparhawk* v. *Yerkes*, 142 U. S. 1.

ANSWERING PETITIONERS' POINT V

The decision is manifestly just.

This is not one of the grounds upon which certiorari is available. Besides, the petitioners, who have schemed and connived to deceive and defraud the Bankruptcy Court, cannot be fitted into an equitable garment, no matter how fancifully they strive.

CONCLUSION

The petition for a writ of certiorari should be denied, with costs and disbursements.

Respectfully submitted,

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